F. M. S. REPORTS.

MOHAMED YUSOOF vs. MURUGAPPA CHETTIAR.

[Court of Appeal (Terrell, Ag. C.J., F.M.S., McElwaine, C.J., S.S., & Aitken, Ag. J.A.) May 30, 1941]

Courts Enactment (Cap. 2), Sections 17, 18—Supreme Court Rules 1935 Rule 1, Sub-rule 9—Contract Enactment (Cap. 52), S. 70—Appeal to Court of Appeal with leave where subject-matter less than $500—Time within which notice of appeal must be given—Quasi-contract—Claim for compensation for non-gratuitous act against person who has enjoyed benefit of it—Claim founded on act constituting a trespass.

The appellant and the respondent were adjoining owners. The respondent built a house on his land and in so doing erected a 9 inch sidewall on the boundary between his land and that of the appellant. No previous arrangement had been made with the appellant who was in fact in India, though he had an attorney in Kuala Lumpur. Later the appellant erected a house on his land and incorporated in the building the sidewall of the respondents' house as the sidewall of his house. After the appellant's house had been built, the respondent claimed the sum of $350 being half the cost of the construction of the wall in question. The appellant refused to pay and thereupon the respondent brought an action against him. The magistrate decided in favour of the respondent, and on appeal Cussen, J. affirmed this decision. On further appeal to the Court of Appeal by leave under S. 17 (a) of the Courts Enactment, the respondent relied on S. 70 of the Contract Enactment.

Held, (Aitken, Ag. J.A. dissenting) that the respondent in building the sidewall without the consent of the appellant, had committed a trespass; what he had done was therefore not 'lawful' so as to enable him to claim compensation under Section 70 of the Contract Enactment.

Cases referred to:—

(1) *Christopher v. Croll* 16 Q.B.D. 66.
(2) *In re Blyth and Young* 13 Ch. D. 416.
(3) *Goh Chong Hin v. Consolidated Malay Rubber Estates Ltd.* 5 F.M.S.L.R. 86.
(4) *Ramsden v. Dyson* (1886) L.R.H.L. 129.
(5) *Willmott v. Barber* (1880) 15 Ch. D. 96.
(6) *Damodara Mudaliar v. Secretary of State for India* (1894) 18 Mad. 88.
(7) *Christie v. Mitchison* (1877) 36 L.T. 621.
(8) *Plimmer v. Mayor of Wellington* (1884) 9 A.C. 699.
(9) *McManus v. Cook* (1887) 35 A.C. 681.
(10) *Proctor v. Bennie* (1887) 36 Ch. D. 760.
(11) *Falcke v. Scottish Imperial Insurance Co.* 34 Ch. D. 239.

MAGISTRATES' CIVIL APPEAL.

M. N. Cumarasami for appellant.

R. Ramani for respondent.

Cussen, J.—This is an appeal by the defendant in Kuala Lumpur Magistrate's Civil Suit No. 839 of 1939 against the judgment given in favour of the plaintiff.

The facts are as follows:—

In November, 1937, the plaintiff, being the registered proprietor of the land contained in lot 431, section 67, in the town of Kuala Lumpur—a building lot—built thereon a house according to plan approved by the Sanitary Board under the building by-laws.

The defendant is and was in November, 1937, the registered proprietor of the land in lot 263, section 67, adjoining the plaintiff's lot 431.

The plaintiff in building his house erected the 9″ side-wall thereof on the boundary between the two lots—thus half the wall was in the defendant's land.

In September, 1938, the defendant erected a house on his lot 263, incorporating in the building the side-wall of the existing plaintiff's house as the side-wall of his house.

After the defendant's house had been so erected, the plaintiff claimed from the defendant a sum of $350 being half the cost of the construction of the wall in question.

The defendant refused to pay this amount on the ground that he was under no legal obligation to do so.

The plaintiff thereupon filed his plaint in this suit.

In the plaint as filed the plaintiff based his claim on the fact that the defendant "had made use of the said party-wall to support his said house."

When the suit came on for hearing, the plaintiff applied to amend his plaint and was allowed to do so —the amendment being as follows: "At the end of the month of February, 1939, the defendant agreed to pay to the plaintiff the sum of $350 being one-half of the cost of erecting the party-wall." The defendant denied any such agreement.

The learned Magistrate in his grounds of judgment makes no finding on this issue of fact, but on the evidence on record, including the evidence of the plaintiff himself, I find that no such agreement was entered into by the defendant or by his attorney. So, on the issue raised by the amendment the plaintiff fails.

The plaintiff's claim then rests upon the user by the defendant of this wall. *Halsbury* (Hailsham Edition) Volume III, paragraph 278, states:—

> "278. The question of contribution of adjoining owners to the expense of building a party-wall may depend on express contract or on a contract implied from common user or other circumstances or on a local custom".

The defendant maintains that, as he never gave any permission or made any agreement, express or implied, authorising the building of the wall half on his land, he is under no liability to pay anything. This, of course, would be quite true of the half-wall built on his land. The building of that without permission was a trespass. But the question is not of that half—4½"—wall, but of the wall as a whole—the entire 9" wall.

Now, when the defendant decided to build upon his land in 1938 he, as required by the Sanitary Board building by-laws, submitted for approval the plans for his proposed house. An examination of these plans shows clearly the wall built by the plaintiff as a wall of the proposed house—it is marked on the plans as "the existing wall" and as "the party-wall."

The plans were approved.

It is relevant to consider the Sanitary Board by-laws with respect to buildings.

In by-law 2 we have defined "external wall" and "party-wall." "External wall" means an outer wall of a building not being a party-wall even though adjoining a wall of another building. "Party-wall" means a wall forming part of a building and used or constructed to be used for separation of adjoining buildings belonging to different owners....."

By-law 17 (v) provides that "where the building forms or is intended to form part of a block of buildings or is erected on any land which has been sub-divided into building lots for shophouses or terrace dwellings:—

> "(b) the buildings shall be separated by walls which, notwithstanding anything hereinbefore contained shall be constructed in accordance with the requirements of the by-laws with respect to party-walls".

By-laws Nos. 70 and 73 provide that the minimum thickness of external walls and of party-walls shall be nine inches.

By-law 6 requires that the plans must be signed by the architect and by the owner.

Now, it is quite clear that, if, in submitting his plans for this house to the Sanitary Board, the defendant had shown only the 4½" of the wall built on his land as the external wall of the house, the plans would not have been approved.

It is, I think, evident that in including the complete 9" wall in his plans that the defendant adopted that wall as a party-wall of his house—the wall as a whole—not only the portion on his land but also the portion on the plaintiff's. And, of course, since the house has been built, the defendant is using that wall —the whole wall—as a party-wall of his house.

In my opinion there follows an implied contract to contribute to the cost of the wall; and I am of opinion that that contract arose and was enforceable when the defendant obtained approval of his plans, or at any rate when he actually built his house; and the plaintiff acquired then a present contractual right to payment of half the cost of the wall.

The defendant in his memorandum of appeal raises also the point that the plaintiff was not at the time of the hearing of this suit the owner of the house and land on lot 431. That is true. The plaint in this suit was filed in May, 1939, and the plaintiff sold this house to a Chinese on 14th June, 1939.

But I do not see that this fact can operate against the plaintiff's claim, which lies in contract. He acquired a claim for a money-payment founded on contract at the latest when the defendant built his house, and I do not see that, in selling his house, he has parted with or lost that right.

The appeal is dismissed with costs.

BEFORE THE COURT OF APPEAL.

R. Ramani for the respondent.

B. J. P. Joaquim (*M. N. Cumarasami* with him) for the appellant.

RAMANI took a preliminary objection that the appeal was out of time. Judgment was delivered by the Judge on 7th September, 1940. The order of the Court of Appeal of the 18th November, 1940, gave leave to appeal: i.e. to bring the appeal; and an appeal has to be brought by Notice of Appeal. See **Christopher v. Croll**(1). Notice of Appeal was not filed until 26th April, 1941. By reason of sections 18 and 20 of the Courts Enactment notice of appeal should have been filed at the latest within one month from the date of the order of the Court of Appeal. This is not a mere technical objection: See **In re Blyth and Young**(2).

JOAQUIM.—The period of one month under sections 18 and 20 of the Courts Enactment is to be calculated from the date of the judgment appealed against. These sections have no application where there has been an intervening order granting leave to appeal. The Court of Appeal when granting such leave did not make any

order as to the time by which notice of appeal must be filed. There is no provision of law delimiting such time and therefore there can be no question of being out of time.

The preliminary objection was overruled.

JOAQUIM.—In building half his wall on the appellant's land, the respondent was to that extent a trespasser. That half of the wall became, in law, the property of the appellant:

Land Code (Cap. 138), section 2. Definition of Land.

The maxim **"quicquid plantatur solo solo cedit"** was applied in **Goh Chong Hin v. Consolidated Malay Rubber Estates Ltd.**(3).

It has now been incorporated in our Law by the Civil Law Enactment (No. 3 of 1937), section 2.

In equity the appellant is entitled to take the benefit of this trespass without compensation.

Ramsden v. Dyson(4). **Willmott v. Barber**(5).

Section 70 of the Contract Enactment (Cap. 32) does not assist the respondent. The essential of that section is that the act should be lawful. The Judge has found that the act was a trespass and there has been no appeal against this finding.

The onus is on the respondent to show that he made a mistake or that the appellant acted in a manner from which a right to compensation could be implied. He has not attempted to discharge this onus and the facts before the Court lead to an inference contrary thereto.

The half wall on the appellant's land is his property in law, and in equity he is entitled to the full benefit thereof, without compensation. If the appellant is using the respondent's half wall to support his (appellant's) house, similarly the respondent is using the appellant's half wall to support his (respondent's) house. There is a mutual user of the whole wall and compensation to neither party can arise thereout.

RAMANI.—The respondent claims on an implied contract founded upon common user. I have always conceded the appellant's title to the wall.

3 **Halsbury (Hailsham)**, p. 162, s. 278.

All rules of equity prevent appellant from using the wall without compensation. **"Lawfully"** in section 70 of the Contract Enactment means "not unlawfully."

Damodara Mudaliar v. Secretary of State for India(6). **Christie v. Mitchison**(7). **Pollock and Mulla**—Indian Contract Act—Sixth Edition, p. 394.

In **Ramsden v. Dyson**(4) the dissenting judgment of Lord Kingsdown has been approved as more appropriately expressing the principle of equity to be followed, cf.

Plimmer v. Mayor of Wellington(8). **McManus v. Cook**(9). **Proctor v. Bennie**(10).

The appellant knew of the respondent's act when he came to build on his own land. He could have required the respondent to remove so much of the wall as was on his (appellant's) land. By using the wall he not only waived his rights in this respect, but he also confirmed that the wall had been built as a party wall.

Section 70 of the Contract Enactment applies. It has been construed as the section to enable Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract.

JOAQUIM in reply:—

Damodara's case relates to an irrigation tank which was in existence and in mutual user. The plaintiffs were able to enter upon and repair the tank without committing a trespass. In the present case the respondent created something, namely the wall, and he committed a trespass in so doing.

Terrell, Ag. C.J.—This is an appeal from the decision of Mr. Justice Cussen, dismissing an appeal from the Magistrate who originally heard the case. The amount was only $350, and accordingly the leave of the Court of Appeal was required under section 17 *(a)* of the Courts Enactment. The application for leave was filed within one month of the judgment of the Court below, which was dated the 7th of September, 1940, and on the 18th of November, 1940, leave to appeal was granted. The Order further stated:—

"And it is further ordered that this appeal be set down for hearing at the next Court of Appeal in Kuala Lumpur."

The notice of appeal was filed on the 26th of April 1941, and the memorandum of appeal on the 30th of April, 1941.

At the hearing before us a preliminary objection was raised that the notice of appeal was out of time. Mr. Ramani for the respondent relied on section 18 (i) of the Courts Enactment, and argued that the appeal should have been brought, by filing the notice of appeal and paying the deposit, within one month of the Order of the 18th of November, 1940. But it is clear from section 18 (ii) that the "month" referred to in secton 18 (i) is a month from the date of the judgment or order appealed from, and that the sub-section is inapplicable where special leave to appeal has been given long after such month has expired. It must be presumed that the Court of Appeal did not make an order which was nugatory *ab initio*. No doubt, if the respondent had insisted, the Order of the Court of Appeal would have provided a time within which the appeal should be brought, but in the absence of any direction on the point, the matter is regulated by the rules relating to proceedings in appeals (1935 Rule 1, *Allen* Vol. I, page 251A). Sub-rule 9 provides that the notice of appeal shall be given not less than 14 days before the commencement of the sitting at which the appeal is heard. This sub-rule was complied with, and as there is no other provision dealing with the matter, the preliminary objection was overruled.

As regards the merits of the appeal the facts are not really in dispute. The appellant and the respondent are adjoining owners. In November, 1937, the plaintiff (respondent) built upon his land a house in accordance with a plan approved by the Sanitary Board. The respondent in building his house erected the 9

inch wall adjoining the appellant's land half on his own land and half on the appellant's. No previous arrangement had been made with the appellant, who was in fact in India though he had an attorney in Kuala Lumpur. The respondent's house was completed in July, 1938, and three months later the appellant erected a house on his own plot, making use of the party wall above referred to. The suit was brought by the respondent claiming from the appellant half the cost of the party wall.

Although an express agreement to construct was at one time alleged (paragraph 3A of the plaint), there has been a finding that no such agreement has been proved. The respondent therefore relied on section 70 of the Contract Enactment (Cap. 52), and the short point for decision is whether the learned Judge in the Court below was right in finding that the provisions of this section could be applied. The section reads as follows:—

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

Admittedly the section goes far beyond the English law, but even so the section must not be strained beyond its actual provision. On the facts it is clear that the respondent, so far as he built a wall which might be of benefit to the appellant, did not intend to do it gratuitously. It is also conceded that the appellant has enjoyed the benefit of the wall built by the respondent. But these are not the only conditions that must be complied with. The plaintiff must establish that he acted lawfully in building the wall, and that he did it for the appellant. In fact, however, in building the wall partly on the appellant's land without his permission, he was not doing a lawful act; on the contrary he was committing a trespass. Secondly, he was not building the wall "for the appellant". He built it entirely for his own benefit, since there was no certainty that the appellant would ever make use of it. As stated in *Pollock* and *Mulla's* Commentary, 6th Edition, page 394;

"The section ought not to be so read as to justify the officious interference of one man with the affairs or property of another, or to impose obligations in respect of services which the person sought to be charged did not wish to have rendered."

In my opinion, therefore, the appeal should be allowed and the judgment in the Court below set aside. The amount of the judgment, if paid, will be refunded. The appellant will be entitled to his costs in the Court of Appeal and in both Courts below, and the deposit will be repaid to him.

McElwaine, C.J. S.S.—The facts of this case are adequately set out in the judgment of Aitken, J.

The respondent's claim rests on section 70 of the Contracts Enactment (Cap. 52), which reads:—

"When a person lawfully does anything for another person....not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation...."

Before the appellant can be made liable four conditions must be fulfilled: the respondent must have built the wall lawfully; he must have intended to benefit the appellant; he must not have intended gratuitously to benefit the appellant; and the appellant must enjoy the benefit of the wall.

Unquestionably the appellant has enjoyed the benefit of the wall. There is no evidence that the respondent intended the appellant to have this benefit free of cost. Claims for payment of part of the cost of the parting wall were made in a letter dated 14th September, 1938, and it is apparent from that letter that requests for payment had been made earlier.

In my opinion the respondent did not intend gratuitously to benefit the appellant.

Did the respondent build the wall for the appellant in the sense of intending the appellant to make use of it? In my opinion he did. These lots of land are building lots. We have no evidence of the size of the appellant's lot, but it appears that the respondent's building occupies the whole width of his lot from its boundary with the appellant's lot on one side to its boundary with Khoo Teik Ee's lot on the other.

It was suggested that the party wall was built half on the appellant's land in order to give 4½ inches more room to the respondent. It is equally probable that the respondent thought that the appellant would build and that the wall would serve and be used as a party wall and for that reason he thought that each should give 4½ inches of land for this 9 inch party wall. If this were not so, it is highly improbable that he would have taken the risk of building this wall partly on the appellant's land.

I think that the respondent in building this wall did intend to benefit the appellant, he built the wall in order that the appellant might share it.

There remains only one point—did the respondent "lawfully" build the wall? The learned Judge said that the building of the half of the thickness of the wall on the appellant's land was a trespass.

I think it undoubtedly was a trespass unless the appellant acquiesced in the building, and I do not see how a trespass can be a lawful act. The appellant, had he so chosen, could have demanded the demolition of the 4½ inches of wall that encroached on his land and he would have succeeded in such an action, as the respondent did not build by mistake and the appellant did not know of the building, provided of course the appellant's attorney did not, on behalf of the appellant and within the scope of his authority, give express or implied leave and licence to build. Now the appellant himself was not in Malaya while the respondent was building his house and there is no evidence that he knew what was being done. There is no suggestion that leave and licence was given by the appellant.

The appellant is a broker. He had an attorney Pakiri Mohamed in Malaya, who, at the time of the trial, had returned to India. This attorney had "full power" and, as the appellant's house was built under the directions of the attorney, I have no doubt he had power to bind his principal by assenting expressly or impliedly to the building of the wall. Unfortunately there is no evidence whatever that the appellant's attorney in any way assented to the building or that he was aware that the wall for half its thickness was on his principal's land.

The only witness called by either side who was in Malaya during the building of the respondent's house, was Arul son of Kulandaisamy a draftsman in the employ of the architect of the respondent's house. This witness supervised the erection of the house. He made no mention of the appellant's attorney being at any time present during the building operations, nor did he give any evidence that the attorney knew that the wall was being built partly on the appellant's land. The onus was on the respondent to prove that he had the consent of the appellant; he failed to prove such consent, and therefore when he built the wall he was a trespasser and what he did on the appellant's land was not lawful.

It was conceded that the half of this wall which was on the appellant's land was indefeasibly vested in the appellant on the principle of *quicquid plantatur solo solo cedit.*

When the plans for the appellant's house were submitted to the Sanitary Board for approval this 9 inch party wall was incorporated in the plan, and Cussen, J., said: "if the appellant had shown only the 4½ inches of the wall built on his land as the external wall of the house, the plans would not have been approved." That may or may not be so. The wall was then in existence and the Sanitary Board had knowledge that it was 9 inches thick. But the learned Judge uses this fact or inference which he draws from the appellant's plan as evidence that the appellant adopted the wall as a party wall, a fact which was not in dispute.

From this inference Cussen, J., further inferred an implied contract. He says:—

> "in my opinion there follows an implied contract to contribute to the cost of the wall; and I am of opinion that that contract arose and was enforceable when the defendant obtained approval of his plans, or at any rate when he actually built his house; and the plaintiff acquired then a present contractual right to payment of half the cost of the wall."

It does not appear that the learned Judge in any way founded himself on section 70 of the Contract Enactment. He makes no reference to that section; on the contrary he describes the building on the appellant's land as a trespass, and as a trespass is not lawful the building of the wall as a whole was not lawfully done within the meaning of the section.

The learned Judge appears to have founded himself on the English law because he quoted paragraph 278 of Volume 3 of *Halsbury* (*Hailsham* Edition) which refers to a contract implied from common user. This passage seems to me to correspond to the following passages in the notes to *Lampleigh v. Braithwait* in 1 *Smith's* Leading Cases, 13th Ed. at pages 155 and 156:

> "It has been observed that in an action upon an executed consideration, it was essential to allege and request, yet it is clear that such a request may be either express or implied. If it has not been made in express terms, it will be implied under the following circumstances....
>
> Secondly, where the defendant has adopted and enjoyed the benefit of the consideration"

a statement of the law which Bowen, L.J., in *Falcke v. Scotish Imperial Insurance Co.*[11], said was too wide. This passage and the notes which followed it in the sixth Edition of *Smith* are started in *Damodara Mudaliar v. Secretary of State for India*[6], to be the source of section 70 of the Indian Contract Act, and if that is so then even though the Contract Enactment may not be exhaustive, we have in this section an express provision outside which we should not wonder.

The appellant says he used 4½ inches thickness of wall which was his own property and asks why should he pay for using his own property even if it receives support from the respondent's part of the wall which in its turn is supported by the appellant's part.

It appears to me that since the respondent committed a trespass in the building of this wall he seeks to recover compensation for his own wrongful act. This wall must be taken as a whole. Mr. Ramani did not suggest that the wall could be divided into one

half lawfully erected and one half unlawfully erected, and in this I think he was right. The respondent has derived an advantage from the appellant's part of the wall in the support which it affords and this sets off the advantage of support which the appellant enjoys.

I would allow the appeal.

Aitken, Ag. J.A.—The parties are the respective owners of two adjoining lots of building land in Kuala Lumpur having one common boundary.

Some time early in 1937 the respondent decided to build a house on his lot, and the requisite building plans were passed by the Kuala Lumpur Sanitary Board on the 24th of May, 1937.

The construction of this house was begun in November, 1937 and finished on the 21st of April, 1938. It was so constructed that one of the 9 inch side walls was erected, quite deliberately, on the common boundary between his land and the appellant's, so that half the wall was on his side of the boundary the other half being on the appellant's. The other side wall was erected, apparently in just the same way, on the common boundary between the appellant's land and that of his other adjoining neighbour one Khoo Teik Ee.

It is common ground that no agreement of any sort or kind was entered into by or between the respondent and the appellant as to this wall either before it was built, during its building or after it was built. No consent was given either by the respondent or his attorney, nor was any objection taken by either of them to the erection of half this side wall on his land.

It is also common ground that the respondent had to make this side wall nine inches thick, otherwise his plans would not have been passed and he could not have proceeded to build.

Very shortly after the respondent had completed his house, if not actually before its completion, the appellant decided to build a house on his lot. For that purpose he had the requisite building plans prepared, and these were passed by the Kuala Lumpur Sanitary Board on the 8th of July, 1938. They show quite clearly that the respondent's side wall on the common boundary was also to be the appellant's end wall on that side.

The appellant began his building operations in September, 1938, and proceeded in accordance with his approved plans until completion on the 16th of December, 1938. Thus, when the appellant had completed the building of his house, the respondent's side wall on the common boundary had become a genuine party wall between their two houses.

As soon as the appellant's intentions in regard to the respondent's side wall, which I will henceforward refer to as the party wall, became clear, the respondent began to press for a party wall agreement, and the payment by the appellant of half the original cost of the party wall. The appellant, however, took his stand on the fact that half the party wall had been erected on his land without his consent, and refused to enter into any party wall agreement or to contribute in any way to the original cost of its erection.

Hence these rather long drawn out proceedings, which commenced when the respondent filed his plaint in the Court of the Magistrate at Kuala Lumpur on the 23rd of May, 1939. In that plaint the respondent based his claim for one half of the cost of erecting the party wall, assessed at $350, on the fact that the appellant had made use of the party wall to support his house.

When the case came on for hearing before the learned Magistrate on the 3rd of October, 1939, the respondent was allowed to amend his plaint by inserting an allegation that the appellant had agreed to pay the respondent the sum of $350 at the end of the month of February, 1939. The appellant denied any such agreement.

The hearing then proceeded, and after one or two adjournments it ended on the 18th of December, 1939, with a judgment for the respondent in the amount claimed and $40 costs.

An appeal to the Court of a Judge followed, which was heard by my learned brother Cussen, J., on the 19th of July and 2nd of August, 1940. His judgment, which was delivered on the 7th of September, 1940, clears up the issue of fact raised by the amendment of the respondent's plaint to which I have already referred in the following short passage:

> "The learned Magistrate in his grounds of judgment makes no finding on this issue of fact, but on the evidence on record, including the evidence of the respondent himself, I find that no such agreement was entered into by the appellant or by his attorney. So, on the issue raised by the amendment the respondent fails."

Nevertheless, the learned Judge dismissed the appeal, and his reasons for doing so appear clearly enough in the following passage from his judgment:—

> "It is, I think, evident that in including the complete 9 inch wall in his plans that the appellant adopted that wall, as a party wall of his house—the wall as a whole —not only the portion on his land but also the portion on the respondent's. And, of course, since the house has been built, the appellant is using that wall—the whole wall—as a party wall of his house.

In my opinion there follows an implied contract to contribute to the cost of the wall; and I am of opinion that that contract arose and was enforceable when the appellant obtained approval of his plans, or at any rate when he actually built his house; and the respondent acquired then a present contractual right to payment of half the cost of the wall."

By that time the appellant's blood was really up, and he sought and obtained special leave to take the opinion of the Court of Appeal upon the justice of his cause. The respondent accepted his challenge, and so we had the advantage of a carefully prepared argument on both sides.

Mr. Joaquim's argument for the appellant may be summarised as follows: the half part of this party wall which the respondent erected quite deliberately on my client's land, but without troubling to obtain his consent, belongs to my client on the principle "*quicquid plantatur solo solo cedit*". Thus, the respondent is at present enjoying the support afforded by my client's half of the wall, and my client is likewise enjoying the support afforded by the respondent's half of the wall. Neither party is enjoying any advantage which is not enjoyed by the other party, and the respondent cannot claim any compensation for the half part of the wall which has become the appellant's because he knew quite well what he was doing when he erected half the wall on my client's land, and my client neither consented to the act nor did anything to encourage the respondent in so doing. Indeed, the appellant was away from Kuala Lumpur at the time, and there is nothing in the evidence to show that he was aware of what the respondent was doing.

For the respondent Mr. Ramani admitted that half of the party wall now belongs to the appellant, and he also admitted that he would not attack the learned Judge's finding on the issue as to the alleged agreement to pay. My note of his argument then continues as follows:—

"The only question is, was the learned Judge right in holding that there was an implied contract to pay compensation arising out of the common user of this party wall." He relied on section 70 of the Contract Enactment, and the Indian case of **Damodara Mudaliar v. Secretary of State for India**(6). According to Mr. Ramani the mere fact that the respondent built half the party wall on the appellant's land showed that he did so in order to benefit the appellant and enable him to use it as a party wall."

If this case fell to be decided by the Law of England, I don't think there is any doubt which way our decision would go, for the principles enunciated in *Ramsden v. Dyson*(4) would be fatal to the respondent's claim. But in my opinion the real question we have to consider is this: do the facts of this case bring the appellant within the four corners of section 70 of the Contract Enactment?

That section reads as follows:—

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

It seems to me that the fulfilment of four conditions is required before a claim such as this can be successfully based on this section:—

(1) the thing done must be lawful,
(2) the person doing it did intend to benefit another person,
(3) the person doing it did not intend to act gratuitously, and
(4) the other person has enjoyed the benefit of the thing done.

Can the appellant be said to have acted lawfully in building one of his side wall half on the respondent's side of the common boundary and half on his own? On the whole I think he can, because there is nothing unlawful in making a man a present of something you build on his land, provided that he does not object. And, in this case, neither the respondent nor any attorney of his has ever raised any objection to the erection of half the party wall on his land.

Did the appellant intend to benefit his next door neighbour when he erected this party wall? Personally I have come to the conclusion that he did, and what has helped me most to come to this conclusion is the fact that he built his other side wall in exactly the same manner on his common boundary with Khoo Teik Ee. I feel sure that when he built his two side walls on his boundaries with his two neighbours, he must have contemplated and intended that both of them would, sooner or later, be converted into party walls by those two neighbours. We know, as a matter of fact, that within a few months of their construction both his neighbours had converted those side walls into party walls.

Did the appellant intend to act otherwise than gratuitously? I feel reasonably confident that his evidence on that point should be accepted, and that the answer to this question is that he did not intend to act gratuitously.

Lastly, does the respondent enjoy the benefit of the thing done? The answer is that undoubtedly and admittedly he does.

These questions and the answers which I have given seem to me to lead inevitably to the conclusion that the appellant has brought himself within the four corners of section 70 of the Contract Enactment, and I am therefore of opinion that this appeal should be dismissed with costs.

Appeal allowed.